

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRAYTUAN HALL,

Defendant-Appellant.

UNPUBLISHED
November 3, 2005

No. 255640
Wayne Circuit Court
LC No. 03-13537-01

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for carjacking, MCL 750.529a, kidnapping, MCL 750.349, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 135 months to 40 years in prison for the carjacking and kidnapping convictions and two years in prison for the felony-firearm conviction. We affirm defendant's convictions and judgment of sentence.

Defendant's first issue on appeal is that defense counsel was ineffective when defense counsel failed to properly investigate the case, failed to present an alibi defense, and failed to make proper objections.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). In addition, questions of constitutional law are reviewed by this Court de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, because a *Ginther*¹ hearing was not conducted, our review is limited to mistakes apparent of the record. *Riley, supra* at 139.

To establish ineffective assistance of counsel, a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness, (2) that defendant was so prejudiced thereby that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). When considering a claim of ineffective assistance of counsel, counsel's performance must be considered without the benefit of hindsight. Moreover, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

We find that defense counsel's performance did not fall below an objective standard of reasonableness. It is well established that this Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). There was no evidence presented in the record that the victim's vehicle contained bullet holes. Further, defendant has neither presented nor suggested any other evidence that was available for defense counsel to investigate. The lower court record is also silent with respect to any neighbors who had any information pertinent to defendant's case. Without this evidence, this Court would be unable to make a determination whether the information would have affected the outcome of the trial.

Even if defense counsel's failure to hire an investigator was deficient, we are convinced that this failure was not outcome determinative. Evidence adduced at trial established that defendant committed the charged crimes. On September 29, 2003, Jason Crowe, defendant's codefendant, called the victim on the telephone and invited him to defendant's house. The victim drove his car to defendant's house and arrived shortly after 1:00 a.m. When he arrived, defendant, Crowe, and an unidentified third man approached him while he sat in his car. The third man walked up to the victim, put a gun to the victim's head, told the victim to give him everything he had in his pockets, and demanded that the victim exit his car. Defendant then jumped into the driver's seat of the victim's car, and the third man ordered the victim to get into the car's trunk. When the victim refused, the third man ordered the victim to get in the back seat. The victim complied. Defendant then drove himself, the victim, Crowe, and the third man to a nearby park. At the park, the third man told the victim that he was going to die unless he could get them some money. The third man had a gun. As the third man attempted to exit the victim's car, the victim grabbed the gun and began to struggle with the third man. At this time, defendant exited the car. The third man told defendant and Crowe to kill the victim, and the victim saw Crowe give defendant a gun. When the victim attempted to exit the vehicle, defendant pointed the gun at the victim's head and pulled the trigger, but the gun did not fire. The victim jumped up from the ground, pushed Crowe, and ran away. As he fled, the victim heard multiple gunshots. We conclude that this evidence was sufficient to establish the elements of the crimes for which defendant was convicted. Therefore, defendant cannot demonstrate that there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Defendant also contends that defense counsel was ineffective for failing to present an alibi defense. However, the record clearly indicates that defense counsel called an alibi witness on defendant's behalf. Defendant's mother testified at trial with respect to defendant's alibi. It is well established that counsel's failure to call a particular witness is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

Defendant further contends that the prosecution improperly vouched for the victim's testimony during closing arguments. However, defendant has merely announced his position on appeal and given the issue cursory treatment. A party may not announce a position on appeal and leave it to this Court to unravel or elaborate his claims. *People v Johnigan*, 265 Mich App 463, 467; 696 NW2d 724 (2005).

In addition, the record indicates that defense counsel effectively cross-examined all of the prosecution's witnesses. In fact, at the close of the prosecution's case, defense counsel moved for a directed verdict, and the trial court directed a verdict for defendant on the armed robbery charge. Therefore, defendant has failed to demonstrate that defense counsel's actions fell below an objective standard of reasonableness.

Defendant next argues that defense counsel was ineffective in failing to call defendant as a witness to support his alibi defense and in failing to suggest that defendant testify on his own behalf.

First, defendant contends that defense counsel's failure to call him as an alibi witness effectively abandoned his alibi defense. Although defendant was not called as a witness, defense counsel did call an alibi witness. Defendant's mother testified at trial with respect to defendant's alibi that he was at home at the time of the incident. Defense counsel's failure to call defendant is presumed to be trial strategy. *Mitchell, supra* at 163. This Court has held that it will not substitute its judgment for that of trial counsel in matters of trial strategy. *Sawyer, supra* at 3. In addition, the record is silent regarding what defendant's testimony would have been. Therefore, defendant has not shown that a reasonable probability exists that, if counsel had called defendant as a witness, the outcome of the proceedings would have been different.

Defendant also contends that defense counsel improperly advised him regarding his right to testify on his own behalf. A valid waiver of the constitutional right to a trial by jury must be voluntary. MCR 6.402(B); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). Before the waiver trial was conducted, defense counsel informed the court that she advised defendant of his constitutional right to a jury trial and that defendant wished to waive that right. The trial court then complied with MCR 6.402(B) and determined that defendant voluntarily waived his right to a jury trial. The trial court asked defendant whether he understood his constitutional right to a jury trial and asked him whether he wanted to waive the right. Defendant responded that he understood the right and wanted to waive the right and be tried without a jury. The record demonstrates that defendant waived his right knowingly and voluntarily. MCR 6.402(B); *Shields, supra* at 560-561. Therefore, we reject defendant's contention that he was improperly advised regarding his right to testify on his own behalf.

Defendant further contends that the trial court improperly scored offense variable ("OV") 3, OV 4, OV 8 and OV 12 and that defense counsel was ineffective when she failed to object to the scoring of OV 4. However, defendant has again merely announced his position on appeal and given the issue cursory treatment. A party may not announce a position on appeal and leave it to this Court to unravel or elaborate his claims. *Johnigan, supra* at 467.

Finally, defendant contends that United States Supreme Court decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) regarding sentencing guidelines controls and that the sentencing factors relied upon by the trial court during

sentencing must be submitted to the jury and proven beyond a reasonable doubt. Although the United States Supreme Court in *Blakely* struck down determinate sentencing schemes as unconstitutional infringements on the role of the jury as factfinder, the Supreme Court made it clear that indeterminate sentencing schemes were not affected by its holding. *Blakely, supra* at 296. Because Michigan employs a constitutional indeterminate sentencing scheme, *Blakely* is not controlling. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello